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21 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**  
22 **FOR THE COUNTY OF LOS ANGELES**

23 EDWARD SMART, and SHANE RABINEAU, ) Case No. BC407882  
24 individually, and on behalf of all others ) Case No. BC426780 (consolidated for all  
25 similarly situated, ) proceedings)  
26 )  
27 Plaintiffs, ) **CLASS ACTION**  
28 )  
29 vs. ) Assigned for All Purposes to:  
30 ) The Honorable Michael L. Stern  
31 OBESITY RESEARCH INSTITUTE, LLC, a ) **SETTLEMENT AGREEMENT AND**  
32 California limited liability company; ) **RELEASE**  
33 ZYLOTRIM LLC, a California limited liability )  
34 company; BRYAN CORLETT, an individual; )  
35 and DOES 1-250, Inclusive, ) Hearing Date: October 4, 2010  
36 ) Hearing Time: 8:30 a.m.  
37 Defendants. ) Dept: 62  
38 )

1 This Settlement Agreement and Release (“Agreement”) is made and entered into by and  
2 among the following parties in *Smart v. Obesity Research Institute, LLC, et al.*, Los Angeles  
3 Superior Court Case No. BC 407882 (the “Litigation”): (i) the Representative Plaintiff Edward  
4 Smart (“Smart”) in his individual capacity and as a representative of the Settlement Class, by and  
5 through his counsel of record in the Litigation; (ii) the Representative Plaintiff Shane Rabineau  
6 (“Rabineau”) in his individual capacity and as a representative of the Settlement Class, by and  
7 through his counsel of record in the Litigation (collectively, “Plaintiffs”) and (iii) Obesity  
8 Research Institute, LLC, a California limited liability company (“ORI”); (iv) Zylotrim LLC, a  
9 California limited liability company (“Zylotrim”); (v) the parents, subsidiaries, related entities,  
10 and assigns of each entity defendant (collectively with ORI and Zylotrim, the “Entity  
11 Defendants”), and (vi) Bryan Corlett, an individual (collectively, “Defendants”), by and through  
12 their counsel of record in the Litigation. Smart, Rabineau, and all Defendants are collectively  
13 referred to herein as the “Settling Parties.” This Agreement is intended by the Settling Parties to  
14 fully, finally and forever resolve, discharge and settle the Released Claims, upon and subject to the  
15 terms and conditions hereof.

16 **I. THE LITIGATION**

17 This Agreement is made for the following purpose and with reference to the following  
18 facts:

19 **A. The Lipozene Litigation**

20 On February 17, 2009, Plaintiff David Atkins ("Atkins"), on behalf of himself and a  
21 proposed class, filed his original complaint seeking injunctive relief and restitution against  
22 defendant Obesity Research Institute ("ORI") and Bryan Corlett regarding ORI's herbal weight  
23 loss supplement called Lipozene (the “Lipozene litigation”). Plaintiff alleged that Defendant  
24 uniformly made several establishment and performance claims on every product label, website,  
25 print and television advertisement for its Lipozene weight loss pill. Plaintiff alleged that these  
26 uniform statements related to the Lipozene product (and its active ingredient, Amorphophallus  
27 Konjac or "glucommanan") constituted per se violations of the UCL, FAL, and CLRA. Plaintiff  
28 alleged that based on these false claims, Defendant charged consumers a premium for Lipozene

1 compared to other glucommanan dietary supplements which do not make the aggressive  
2 advertising claims that Defendant makes for Lipozene. ORI answered the Complaint on April 1,  
3 2009. Discovery ensued and Plaintiff filed a motion for class certification on November 5, 2009.

#### 4 **B. The Zylotrim Litigation**

5 On November 9, 2009, plaintiff Edward Smart sent a demand letter pursuant to the  
6 Consumers Legal Remedies Act (“CLRA”) to defendant Zylotrim, LLC, requesting that remedial  
7 action be taken. On November 24, 2009, the representative plaintiff Edward Smart (the “*Smart*  
8 case”) filed his original complaint on behalf of a purported class, alleging violations of  
9 California’s unfair competition law, *California Business & Professions Code* §17200 *et seq.*,  
10 violation of the CLRA, *California Civil Code* §1750 *et seq.*, unjust enrichment, and breach of  
11 warranty. The *Smart* case concerns a weight loss supplement called Zylotrim. Plaintiff alleges  
12 that the claims by Defendants regarding Zylotrim are false and/or misleading.

#### 13 **C. Consolidation of Cases**

14 Because the *Rabineau* and *Smart* cases alleged almost identical class-wide claims based on  
15 different weight loss supplements produced by Defendants, Plaintiffs submitted Notices of Related  
16 Cases and the Settling Parties Stipulated to the consolidation of the cases for pretrial purposes.  
17 The Amended (consolidated) Complaint was filed on January 19, 2010. Once this Amended  
18 Complaint was filed, additional depositions and discovery occurred, along with additional  
19 negotiations.

20 On or about March 12, 2010, the Settling Parties, by and through their counsel of record,  
21 executed a Compromise Term Sheet at a mediation presided over by Justice Steven Stone, which  
22 summarized the substantive terms of their agreement to resolve this Litigation.

## 23 **II. DEFENDANTS’ STATEMENT AND DENIALS OF WRONGDOING AND** 24 **LIABILITY**

25 Neither this Agreement nor anything contained herein, nor any act or thing done in  
26 connection herewith, is intended to be or shall be construed or deemed an admission by any  
27 Defendant of any fact, contention, claim, liability, fault or wrongdoing whatsoever. Defendants  
28 have each denied and continue to deny each and all of the claims and contentions alleged by the

1 Representative Plaintiffs in the Litigation, or that could have been alleged in the Litigation.

2 Defendant ORI maintains that: (i) Every claim made in each advertisement for Lipozene®  
3 is substantiated by credible, independent, scientific evidence, including clinical trials; (ii) each  
4 advertisement released for Lipozene® undergoes careful scrutiny, often including scrutiny of  
5 claim substantiation by administrative agencies such as the FDA and the FTC, as well as pseudo-  
6 regulatory bodies such as the National Advertising Review Council (NARC); (iii) full relief in the  
7 form of a refund has always been made available to any dissatisfied customers of Lipozene®; (iv)  
8 ORI at all times during product development and marketing acts in good faith to provide quality  
9 dietary supplements based on known scientific principles.

10 Defendant Zylotrim, LLC maintains that: (i) Every claim made in each advertisement for  
11 Zylotrim® is substantiated by credible, independent, scientific evidence, including clinical trials;  
12 (ii) each advertisement released for Zylotrim® undergoes careful scrutiny, often including  
13 scrutiny of claim substantiation by administrative agencies such as the FDA and the FTC, as well  
14 as pseudo-regulatory bodies such as the National Advertising Review Council (NARC); (iii) full  
15 relief in the form of a refund has always been made available to any dissatisfied customers of  
16 Zylotrim®; (iv) Zylotrim LLC at all times during product development and marketing acts in good  
17 faith to provide quality dietary supplements based on known scientific principles.

18 Having taken into account the expense of litigation, among other things, Defendants have  
19 nonetheless concluded that substantial time and expense will be saved, and their interests will be  
20 served by settling all claims against them in the manner and upon the terms and conditions set  
21 forth in this Agreement. Defendants have therefore agreed to enter into this Agreement to avoid  
22 the further expense, inconvenience, and distraction of burdensome and protracted litigation, and to  
23 be completely free of any further claim or controversy arising out of the sale of Lipozene®,  
24 Zylotrim®, and any other of Defendants' or Defendants' affiliates' products. .

25 **III. BENEFITS OF SETTLEMENT**

26 The Representative Plaintiffs believe that the claims asserted in the Litigation have merit.  
27 However, the Representative Plaintiffs and Representative Plaintiffs' Counsel recognize and  
28 acknowledge the expense and length of continued proceedings necessary to prosecute the

1 Litigation against Defendants through trial and appeals. The Representative Plaintiffs and  
2 Representative Plaintiffs' Counsel also have taken into account the uncertain outcome and the risk  
3 of any litigation, especially in complex actions such as this Litigation, as well as the difficulties  
4 and delays inherent in such litigation. The Representative Plaintiffs and Representative Plaintiffs'  
5 Counsel are mindful of the inherent problems of proof under, and possible defenses to, state  
6 consumer law violations and other claims asserted in the complaints. The Representative  
7 Plaintiffs and Representative Plaintiffs' Counsel believe that the Settlement set forth in the  
8 Agreement confers substantial benefits upon the Settlement Class and each of the Settlement Class  
9 Members. Based on their evaluation, the Representative Plaintiffs and Representative Plaintiffs'  
10 Counsel have determined that the Settlement set forth in the Agreement is in the best interests of  
11 the Representative Plaintiffs and the Settlement Class and each of the Settlement Class Members.

12 **IV. TERMS OF THE SETTLEMENT AGREEMENT AND RELEASE**

13 **A. The Settlement Agreement**

14 1. The named plaintiffs, the class, and plaintiffs' counsel in this action ("the Settling  
15 Plaintiffs") shall provide Defendants, their parents, subsidiaries, related entities, successors,  
16 affiliates, agents, officers, directors, distributors, manufacturers, retailers, advertisers and/or  
17 assigns, if any, including, without limitation, any defendant that has ever been named in this  
18 lawsuit, with a release of any and all claims, allegations or disputes of any kind that the putative  
19 class may have, whether known or unknown, related to the packaging, labeling, ingredients,  
20 advertising and/or promotion of Defendants' products (inclusive of a waiver pursuant to Civil  
21 Code Section 1542). All of the parties released in this paragraph shall also provide a reciprocal  
22 release to the named plaintiffs, and their attorneys and agents.

23 2. Upon execution of the settlement agreement and final approval by the Court, the  
24 case will be settled on a nationwide class-wide basis. The putative settlement class will include all  
25 consumers located within the United States, its territories, and military facilities who purchased  
26 one of Defendants' products at issue, related to or arising out of the packaging, labeling,  
27 advertising and/or promotion of any of Defendants' products.

28 3. Upon execution of the settlement agreement and final approval by the Court, which

1 shall be conditions precedent to these obligations by ORI, ORI shall:

- 2 (a) Make changes to product packaging and advertising to its Lipozene product, as  
3 detailed in Section IV.B;
- 4 (b) Provide refunds (up to a maximum of \$29.95 per class member) to all putative class  
5 members who purchased Lipozene and follow claim procedures, up to an aggregate  
6 maximum of \$25,000 subject to subsection (c);
- 7 (c) Report in writing to Mr. Rabineau's counsel on a bi-weekly basis regarding: the  
8 number of claims made, the number of claims approved, the number of claims  
9 rejected and, if any rejections, the reason for such rejection. The Settling Parties  
10 agree that the \$25,000 maximum is adequate to cover all anticipated claims. If  
11 aggregate claims exceed \$25,000, they will be paid to claimants on a pro rata basis.  
12 If aggregate claims exceed \$25,000 for claims related to Lipozene while aggregate  
13 claims are less than \$25,000 for claims related to Zylotrim, any remaining monies  
14 from the Zylotrim funds shall be used towards the pro rata calculation and payment  
15 of Lipozene claims.

16 4. Upon execution of the settlement agreement and final approval by the Court, which  
17 shall be conditions precedent to these obligations by Zylotrim, Zylotrim shall:

- 18 (a) Discontinue the sale of Zylotrim except as to sell-through remaining inventory;
- 19 (b) Provide refunds (up to a maximum of \$29.95 per class member) to all putative class  
20 members who purchased Zylotrim and who follow claim procedures, up to an  
21 aggregate maximum of \$25,000 subject to subsection (c);
- 22 (c) Report in writing to Mr. Smart's counsel on a bi-weekly basis regarding: the  
23 number of claims made, the number of claims approved, the number of claims  
24 rejected and, if any rejections, the reason for such rejection. The Settling Parties  
25 agree, based upon representations of Zylotrim, that the \$25,000 maximum is  
26 adequate to cover all anticipated claims. If aggregate claims exceed \$25,000, they  
27 will be paid to claimants on a pro rata basis. If aggregate claims exceed \$25,000  
28 for claims related to Zylotrim while aggregate claims are less than \$25,000 for

1 claims related to Lipozene, any remaining monies from the Lipozene funds shall be  
2 used towards the pro rata calculation and payment of Zylotrim claims.

3 5. The Plaintiffs may each apply to the Court for an award of fees and costs to be paid  
4 as follows: ORI agrees to attorney's fees and costs not to exceed \$146,250 inclusive of interest,  
5 any portion of which may be designated as catalyst fees by counsel in the ORI litigation; Zylotrim  
6 agrees to attorney's fees and costs not to exceed \$178,750 inclusive of interest, any portion of  
7 which may be designated as catalyst fees by counsel in the Zylotrim litigation. The Entity  
8 Defendants stipulate to the award of such fees and that such fees against each of them are  
9 reasonable. Fees awarded by the Court shall be paid no later than 14 days after final approval of  
10 the settlement by the Superior Court.

11 6. Payment of all costs and expenses associated with the administration of the  
12 settlement shall be made directly by the Entity Defendants. The Settling Parties agree that notice  
13 pursuant to California Rule of Court 3.766, through direct e-mail, publication on Defendants'  
14 websites, and printed notice published jointly by the Entity Defendants in a national publication is  
15 the most practical and effective notice available under the circumstances.

16 7. ORI shall not oppose, in any way, an additional request for an incentive payment  
17 up to \$2,500 to class representative Shane Rabineau, and Zylotrim shall not oppose in any way an  
18 additional request for an incentive payment up to \$2,500 to class representative Edward Smart,  
19 which shall be payable by Defendants at the same time and on the same terms as Plaintiffs'  
20 attorneys' fees.

21 8. This settlement shall not be deemed an admission of liability or wrongdoing on the  
22 part of Defendants, their parents, subsidiaries, related entities, successors, affiliates, agents,  
23 officers, directors, distributors, manufacturers, advertisers, retailers and/or its assigns, including,  
24 without limitation, any defendant that has ever been named in this lawsuit, and it may not be used  
25 in any proceeding for that purpose. Defendants each deny all liability.

26 9. Attorneys' fees awarded by the Court shall be paid by the Entity Defendants to an  
27 agreed-upon escrow, rather than directly to Plaintiffs' various counsel, in the event the settlement  
28 is subject to objections. In the event of an objection to the settlement, said fees will be held in

1 escrow until the settlement becomes final and all appellate rights with respect to such objection  
2 have been extinguished or exhausted.

3 10. This litigation was resolved over multiple mediation sessions during arms length  
4 negotiations before a mediator. Any disputes involving this agreement shall be resolved through  
5 binding arbitration before Justice Stone with the prevailing party entitled to attorneys' fees.

6 11. This agreement contains all material terms agreed to by the parties and shall be  
7 binding and fully enforceable as written. This agreement is contingent upon court approval.

8 **B. Changes to Product Packaging**

9 Pursuant to Section IV.A.3(a) above, the parties have agreed to the following changes to  
10 ORI's product packaging for Lipozene®. No changes will be made to Zylotrim® product  
11 packaging, as Zylotrim, LLC has agreed that it is only selling off remaining inventory and  
12 discontinuing sale of the product. Such changes are as follows:

13 1. ORI will ensure all its dosage instructions and advertisements reflect the  
14 relationship between dosage and clinically-supported results by including a statement such as (for  
15 example only) "Based on clinical studies, the recommended dosage for optimum results is the  
16 daily maximum dosage of 6 capsules per day," or by providing dosage instructions consistent with  
17 clinically-supported results data. Any reference to clinical studies or the results of clinical studies  
18 shall be accompanied by dosage information which is consistent with the clinically-supported  
19 results data for such studies.

20 2. Defendants will not use the following specific statements in future advertising.  
21 - Lipozene® should be considered before "liposuction"  
22 - "Lipozene® is backed by 12 clinical studies"  
23 - "amazing weight loss"  
24 - "dramatic weight loss"  
25 - any claim that single order use of Lipozene® leads to long-term weight loss  
26 or that weight loss will be maintained after discontinuing use of Lipozene®  
27 - "begin to uncover lean muscle"  
28 - "begin to reveal a flat tummy, ripped abs, tight buns, and firm thighs"

- 1 - the phrase “Fit & Lean with Lipozene®” shall be used solely in connection  
2 with the current Club program and not in any other context nor in any  
3 television advertising.
- 4 3. Defendants may, under the terms of this agreement, in future advertising:
- 5 - continue to make comparative or background references to obesity rates and  
6 surgical procedures that address fat and obesity as long as such references  
7 do not equate the efficacy of Lipozene® with surgical procedures;
- 8 - continue to make statements referring to the existence of scientific evidence  
9 and clinical studies that support the efficacy of glucommanan products, so  
10 long as the dosage instructions are consistent with the dosage shown to be  
11 effective as stated in Section IV.B.1.

12 DATED: September 23, 2010

**KIRTLAND & PACKARD LLP**

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